No. 85-2079

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

LABORERS, HEALTH AND WELFARE TRUST FUND FOR NORTHERN CALIFORNIA, *et al.*,

Petitioners,

v.

ADVANCED LIGHTWEIGHT CONCRETE COMPANY, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* IN SUPPORT OF THE RESPONDENT

AND

BRIEF *AMICUS CURIAE* OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.

A. J. HARPER II
Counsel of Record
T. J. Wray
David M. Thomas

1301 McKinney Street
Houston, Texas 77010
(713) 651-5151

Attorneys for Associated General Contractors of America, Inc.

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Pursuant to Rule 36 of the Rules of this Court, the Associated General Contractors of America, Inc. ("AGC") respectfully moves for leave to file the accompany Brief as *amicus curiae* urging that the decision below be affirmed. Respondent has consented to the filing of this Brief; the Petitioners have not. In support of this Motion AGC shows as follows:

1. This Motion is necessitated by the failure, upon request, of the Laborers, Health and Welfare Trust Fund for Northern

California, et al., Petitioners, to give written consent to the filing of a Brief by AGC as *amicus curiae*.

2. AGC is a national trade association engaged in the construction industry. Its approximately 32,000 members include approximately 8,000 leading general construction contractors. Over 80% of all commercial, industrial, highway, and bridge construction in the United States is performed by its members. Through 106 chapters located throughout the United States, the AGC acts for and on behalf of individual contractors in matters which include the negotiation and administration of collective bargaining agreements with various building and construction trade unions. AGC, through its chapters, has also participated in the formation of various multiemployer fringe benefit trust funds under § 302(c) of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 186(c), and its members frequently serve as the statutorily required employer trustees on multiemployer fringe benefit trust funds.

3. AGC regularly represents general contractor members in important matters vitally affecting their interests before the courts, the United States Congress, the Executive Branch and independent regulatory agencies of the federal government. This includes rendering assistance to the courts in their deliberations on significant decisions concerning labor-management relations in the construction industry.

4. The question presented by this case is whether a federal district court has jurisdiction under §§ 502 and 515 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1132 and 1145, over an action by the trustees of a multiemployer employee benefit plan to collect contributions from an allegedly delinquent employer where the employer's alleged obligation to contribute arises from its duty under § 8(a)(5) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158(a)(5), to refrain from unilaterally changing the terms and conditions of employment during collective bargaining following contract expiration. The United States Circuit Court of Appeals for the Ninth Circuit in *Laborers Health & Welfare Trust v. Advanced Lightweight Concrete*, 779 F.2d 497 (9th Cir. 1985), *cert. granted*, ___ U.S. ___, 107 S.Ct. 1283 (1987), held that the decision in this case was dependent upon an underlying labor law issue within the exclusive jurisdiction of the National Labor Relations Board and therefore affirmed the district court's grant of summary judgment to Respondent based on lack of subject matter jurisdiction.

5. AGC addresses in the accompanying Brief the practical effects on the collective bargaining process and the uncertainties, inconsistencies, delays and expenses which would result from a reversal of the court below. Based on conversations with attorneys for Advanced Lightweight Concrete Company it is the belief of AGC that these questions will not be addressed in other Briefs submitted on behalf of the Respondent. AGC respectfully submits that it is in a unique position to present argument and analysis on behalf of the construction industry in assisting this Court in its consideration of these issues.

WHEREFORE, AGC respectfully moves that it be granted leave to file the accompanying Brief as *amicus curiae*.

Respectfully submitted,

A. J. Harper II

A. J. Harper II
Counsel of Record
T. J. Wray
David M. Thomas

FULBRIGHT & JAWORSKI
1301 McKinney Street
Houston, Texas 77010
(713) 651-5151

COUNSEL FOR *AMICUS CURIAE*

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BRIEF *AMICUS CURIAE* OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC. IN SUPPORT OF THE RESPONDENT

The Associated General Contractors of America, Inc. ("AGC") hereby submits this brief in support of the Respondent in No. 85-2079 on a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on December 26, 1985.

INTEREST OF THE *AMICUS CURIAE*

A statement describing the AGC and its interest in this case is set forth in the preceding Motion requesting leave to file this *amicus curiae* brief.

SUMMARY OF ARGUMENT

The National Labor Relations Board ("NLRB" or "Board") has, with limited exceptions which do not extend to resolution of core unfair labor practice disputes, exclusive primary jurisdiction to resolve unfair labor practices. This exclusive jurisdiction is necessary to ensure uniformity and consistency in national labor policy. Congress, in passing the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. § 1001 *et seq.* ("ERISA"), did not create a second forum to resolve unfair labor practice disputes or otherwise preempt the NLRB's exclusive jurisdiction under the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* ("NLRA" or "Act").

Exclusive NLRB jurisdiction in such matters is necessary to promote the collective bargaining process. To permit the district courts to utilize ERISA to determine in the first instance whether unfair labor practices have occurred would create uncertainty as to the rights and duties of the parties to collective bargaining agreements and would result in delays in the resolution of disputes because of longer ERISA statutes of limitation and loss of Board efficiency. Such uncertainty would result in resistance to inclusion of benefit funds in collective bargaining agreements thereby frustrating the purposes of ERISA and the NLRA.

Such a result is unnecessary because the interests of benefit trust funds can be adequately protected by utilization of the Board to address situations where allegations of unfair labor practices are the core issues of alleged failures to contribute to benefit funds. The NLRB can utilize subpoenas to investigate the unfair labor practice allegations and can fashion full relief in the event that it finds a violation. Moreover, it can do so more rapidly and efficiently than can the district courts without the risk of inconsistent adjudications.

The decision below therefore should be affirmed. However, if this Court should reverse, it should require the trusts to initially resort to the NLRB and abide by its decision. The Court should also hold that in event of administrative dismissal of a charge, trustees satisfy their fiduciary responsibilities under ERISA by electing to rely upon such dismissal.

ARGUMENT

I.

THE COLLECTIVE BARGAINING PROCESS WOULD BE ADVERSELY AFFECTED BY LITIGATION OF UNFAIR LABOR PRACTICES IN ACTIONS UNDER ERISA.

At this date there can be little dispute that as a general rule the NLRB has exclusive primary jurisdiction to determine unfair labor practices. *See Meyers v. Bethlehem Shipbuilding Company*, 303 U.S. 41, 48-49 (1938). Federal as well as state courts generally must defer to the NLRB's jurisdiction and competence. *See Golden State Transit Corp. v. City of Los Angeles*, ___ U.S. ___, 106 S.Ct. 1395, 1398 and n.8 (1986); *Kaiser Steel Co. v. Mullins*, 455 U.S. 72, 83 (1982); *San Diego Bldg. & Constr. Trades Council v. Garmon*, 359 U.S. 236, 246 (1959); *Garner v. Teamsters*, 346 U.S. 485, 490-91 (1953).[1]

The exceptions to this doctrine have been limited, and have not extended to circumstances in which an alleged unfair labor practice is at the core of the dispute and the dispute does not involve issues of contract interpretation or application. The collective bargaining process and the framework in which collective bargaining negotiations take place are a central concern of the NLRA, and the NLRB is the agency designated to provide the necessary safeguards and rules to govern that process. *See Golden State Transit Corp. v. City of Los Angeles*, 106 S.Ct. at 1401; *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180, 191 (1978);[2] *Garner v. Teamsters*, 346 U.S. at 490.

The principal rationale for exclusivity is to assure uniformity in the development and administration of national labor policy. *See Sears, Roebuck & Co.*, 436 U.S. at 191. Congress in passing ERISA did not change this, but carefully provided

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[1] Exclusive, primary jurisdiction as used herein refers to this Court's use of these terms in cases such as *San Diego Bldg. & Constr. Trades Council v. Garmon*, rather than the administrative law use of the terms "primary jurisdiction." *See, e.g., Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180, 199 n.29 (1978).

[2] "[W]hen the same controversy may be presented to the ... court *or* the NLRB, it *must* be presented to the Board." *Id.* at 202. (Emphasis added).

ERISA was not to preempt other federal laws. 29 U.S.C. § 1144(d) (1982).

The importance of the collective bargaining process and the risks inherent to that process from a lack of uniform regulation led this Court to its decision in *Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95 (1962), where it held that the possibilities of conflicting rulings would impede the collective bargaining process, prolong disputes and tend to lead to resistance to the inclusion of provisions in contracts favored by national labor policy. *Id.* at 103-04. The Court was dealing with arbitration provisions under a collective bargaining agreement and federal law under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 141 *et seq.* ("LMRA").[3] The risks to the collective bargaining process and to the inclusion of provisions relating to pension, health and welfare or similar benefits are no less great in this case.

[3] The Court had created an exception to exclusive NLRB jurisdiction under § 301. *See Smith v. Evening News Ass'n.*, 371 U.S. 195 (1962). That exception, however, should not be extended so as to swallow the principle. The Court has recognized that under § 301, the NLRB has concurrent jurisdiction; however, § 301 jurisdiction is dependent on the existence of a contract. 29 U.S.C. § 185. *See, e.g., IBEW Local 22 v. Nanco Elec. Co.*, 790 F.2d 59 (8th Cir. 1986); *Teamsters Local 807 v. Brinks, Inc.*, 744 F.2d 283 (2d Cir. 1984); *UMW v. Allied Corp.*, 735 F.2d 121 (4th Cir. 1984), *cert. denied*, 473 U.S. 905 (1985); *Cooper v. General Motors Corp.*, 651 F.2d 249 (5th Cir. 1981); *UAW v. Atlas Tack Corp.*, 590 F.2d 384 (1st Cir. 1979); *Cement Masons Trust Fund v. Kirwood-Bly*, 520 F. Supp. 942 (N.D. Cal. 1981), *aff'd* for the reasons stated in the district court's opinion. 692 F.2d 641 (9th Cir. 1982). *See also, Jim McNeff Inc. v. Todd*, 461 U.S. 260 (1983) (§ 301 jurisdiction exists to enforce § 8(f) pre-hire agreement only prior to its repudiation). ERISA's terms in §§ 515 and 502 are entirely consistent with this doctrine. Congress clearly relied on § 301 in developing ERISA's § 502 scheme. *See Pilot Life Inc. Co. v. Dedeaux*, ____ U.S. ____, 107 S.Ct. 1549 (1987). Congress was aware of the possible expiration of collective bargaining agreements and the existence of a hiatus period. Where such situations occurred, Congress carefully provided that no withdrawal liability would arise where a continuing duty to contribute existed under the NLRA. 29 U.S.C. §§ 1383, 1392 (1982). Congress also was careful to exclude the obligation "to pay delinquent contributions" from this provision. *Id.*

If Petitioners' position is adopted, the district courts of the United States will acquire concurrent jurisdiction with the NLRB, not to interpret contracts but to address and decide fundamental, core issues arising under Section 8(a)(5) of the Act.[4] The core dispute in this case is whether Respondent violated Section 8(a)(5) of the Act by unilaterally ceasing contributions to the funds in violation of its § 8(a)(5) duty to maintain the *status quo ante* after expiration of the collective bargaining agreements requiring the contributions. Under the NLRA, no such duty exists if an impasse in negotiations, waiver or some other circumstance justifies unilateral action. *E.g., NLRB v. Katz*, 369 U.S. 736 (1962).

A determination of whether an impasse has occurred is highly subjective and a matter particularly suited to NLRB determination. *Huck Mfg. v. NLRB*, 693 F.2d 1176, 1186 (5th Cir. 1982). In evaluating whether impasse exists, the Board has considered factors such as the existence of a strike or whether the union has approached its membership concerning a strike possibility, *Presto Casting Co.*, 262 N.L.R.B. 346 (1982), *enf'd in part*, 708 F.2d 495 (9th Cir. 1983), *cert. denied*, 464 U.S. 994 (1983), the statements or understandings of the parties as to whether impasse exists, *J. D. Lunsford Plumbing, Heating & Air Conditioning, Inc.*, 254 N.L.R.B. 1360 (1981), *aff'd sub nom. Sheetmetal Workers v. NLRB*, 684 F.2d 1033 (D.C. Cir. 1982), whether bargaining is continuing, *Huck Mfg. Co. v. NLRB*, 693 F.2d at 1186, the firmness of the parties' positions, *Morco, Inc. d/b/a Town Plaza Hotel*, 258 N.L.R.B. 69 (1981), the bargaining history between the parties, *Marriott In-Flite Servs., Div. of Marriott Corp.*, 258 N.L.R.B. 755 (1981), *enf'd*, 729 F.2d 1441 (2d Cir. 1983), *cert. denied*, 464 U.S. 824 (1983), whether anti-union animus was evidenced by the employer, *Id.*, the time between bargaining meetings, *Southern Newspapers, Inc. d/b/a*

[4] Indeed, in those cases where this Court has allowed exceptions to NLRB exclusive jurisdiction, the Court has been careful to declare that the issues upon which courts can exercise jurisdiction involve matters of only "peripheral" or "collateral" concern under the NLRB. *See, e.g., Farmers v. Carpenters*, 430 U.S. 290, 304 (1977); *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 276 (1971); *San Diego Bldg. & Constr. Trades Council v. Garmon*, 359 U.S. at 243-44.

The Baytown Sun, 255 N.L.R.B. 154 (1981), and various other circumstances. *See, e.g., J. D. Lunsford Plumbing, Heating & Air Conditioning, Inc.*, 254 N.L.R.B. at 1360 ("most favored nations" clause militated in favor of finding impasse). The Board, with its special expertise and over fifty years of experience, has recognized that the question of whether an impasse exists is often elusive and involves the exercise of judgment in each case. *E.g., Taft Broadcasting Co.*, 163 N.L.R.B. 475, 478 (1967), *aff'd sub nom., AFTRA v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968); *Servis Equipment Co.*, 198 N.L.R.B. 266, 269 (1972).

To empower the various district courts with the authority to decide, in the first instance, whether or not a bargaining impasse has occurred would create a potential for inconsistent decisions which would create uncertainty in the rights and duties of parties subject to the national labor law.[5] As stated by this Court in *Garner v. Teamsters*, 346 U.S. at 491: "A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law." To avoid such conflict and to foster a *national* labor policy, Congress has entrusted the administration of the labor policy of the United States to the

[5] If Congress had intended for the district courts to resolve unfair labor practice issues in ERISA collection cases, it would have so stated. In fact, the language used by Congress in 29 U.S.C. § 1392(a) indicates that it intended to preclude imposition of withdrawal liability on employers who continue to have an obligation to contribute "as a result of a duty under applicable labor-management relations law." But when creating a cause of action for failing to make contributions, Congress mandated that such actions be brought "under the terms of the plan or under the terms of a collectively bargained agreement." 29 U.S.C. § 1145.

By granting jurisdiction to the district courts in cases arising "under collective bargaining agreements" while recognizing as it did in 29 U.S.C. § 1392(a) that withdrawal liability may be imposed when the duty to contribute as a result of collective bargaining agreements *or* as a result of the operation of labor-management relations law ceases, it is apparent, that in situations such as the one before this Court, Congress did not intend that the district courts exercise jurisdiction. *See Switchmen's Union v. NMB*, 343 U.S. 297, 300 (1943).

National Labor Relations Board which has its own procedures, specialized knowledge and experience. *Meat Cutters v. Fairlawn Meats*, 353 U.S. 20 (1957); *Garner v. Teamsters*, 346 U.S. at 490.

There can be little doubt that the NLRB is better able to resolve disputes arising under the labor policy of the United States than are the various district courts. To submit cases such as the one at hand to the district courts for resolution would require them to exercise authority in an area where they lack the experience of the NLRB and would create potential for conflict in the administration of national labor policy.[6]

Further, should the district courts be permitted to exercise jurisdiction, the Congressional desire for expeditious resolution of these unfair labor practice issues will be at severe risk. Under the Act, charges of an unfair labor practice must be presented within six months of their occurrence. 29 U.S.C. § 160(b). Collection suits under § 502(g) of ERISA may be brought at any time within the applicable limitations periods governing contract or collection actions in the various states. *See, eg., Central States Pension Fund v. Kraftco, Inc.*, 799 F.2d 1098, 1107 (6th Cir. 1986) *(en banc); Byrnes v. DeBolt Transfer, Inc.*, 741 F.2d 620 (3d Cir. 1984). In most states the

[6] This Court has noted that in the field of labor law, "Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to provide primary interpretation and application of its rules to a specifically constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision including judicial relief pending a final administrative order. Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid those diversities likely to result from a variety of local procedures and attitudes toward labor controversies."

Garner v. Teamsters, 346 U.S. at 490.

Although specifically addressing state court activity, the court earlier noted, "The power and duty of primary decision lies with the Board, not with us." *Garner v. Teamsters*, 346 U.S. at 489. It is apparent that this court recognized, as did Congress, the necessity, in the interest of uniformity, that the NLRB exercise initial jurisdiction in unfair labor practice matters. *See also San Diego Bldg. & Constr. Trades Council v. Garmon*, 359 U.S. at 244-45.

limitations periods for violations of a contract are three or more years.[7] In short, if Petitioners' position is sustained, a dispute which is *solely* based upon an asserted unfair labor practice could become stale (and indeed time barred under the NLRA) before it was ever presented for adjudication under ERISA.

This Court in a similar context has recognized and emphasized the importance of rapid resolution of and uniformity in the deciding of issues involving the collective bargaining process. *Del Costello v. Teamsters*, 462 U.S. 151 (1983). Where the collective bargaining process is at issue, not only is uniformity essential, but so is the rapid resolution of disputes. "[I]t is of the utmost importance that the law reflect the realities of industrial life and the nature of the collective bargaining process." *Id.* at 172 (Quoting Justice Goldberg, concurring, in *Humphrey v. Moore*, 375 U.S. 335, 358 (1964)).[8]

Uncertainty and the potential for long-delayed challenges to positions taken in collective bargaining would have a deleterious impact on that process. *Del Costello v. Teamsters*, 462 U.S. at 169 (longer statutes of limitations have a major impact on the collective bargaining process where a decision made could be called into question "as much as [three] years later" (quoting *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 64 (1981))). The longer time limitations for filing complaints would tend to prolong disputes arising in bargaining and the risks associated therewith.[9] Moreover, the risks of inconsistent, widely divergent rulings by the various district courts would not only defeat one of the central concerns of national labor policy under the Act,[10] but would also impede and detract from one of

[7] *See, e.g.*, 8 Martindale Hubbell Law Directory pt. I (119th ed. & Supp. 1987).

[8] This Court could, of course, adopt § 10(b) as the period of limitations for suits under ERISA. This would alleviate one of the concerns expressed herein as to the impact on the collective bargaining process of a reversal of the decision below. Such a course of action would, however, raise other possible concerns under ERISA. *See, e.g., Central States Pension Fund v. Kraftco, Inc.*, 799 F.2d 1098 (6th Cir. 1986) *(en banc)*.

[9] In an ERISA collection action under § 502(g)(2), time *is* money.

[10] *See, e.g., Golden State Transit Co. v. City of Los Angeles*, 106 S.Ct. at 1401; *Garner v. Teamsters*, 346 U.S. at 490-91.

the very purposes of ERISA—to provide pension and other funds for the benefit of employees. *See Pension Benefit Guaranty Corp. v. R. A. Gray & Co.*, 467 U.S. 717 (1984). This result would surely follow from a decision which would allow an adverse impact on the collective bargaining process, for it is through the collective bargaining process that employer participation in jointly administered trust funds is established and maintained. If employers are confronted, as they will be if the decision below is reversed, with the potential risks and delays, the multiple forums and possible inconsistency of results, then the natural tendency of employers will be to avoid such risks and delays by refusing to include ERISA-covered benefits in collective bargaining agreements. Extending jurisdiction to the courts to resolve unfair labor practices in ERISA collection actions would thus disserve the purposes of both the NLRA and ERISA.

II.

THE NLRB CAN EFFECTIVELY AND PROMPTLY REMEDY THE ALLEGED UNLAWFUL CONDUCT

The NLRB has had over fifty years of experience in investigating unfair labor practice charges. None of the parties have suggested or should suggest that the NLRB will not adequately fulfill its obligations under the Act to promptly and fully investigate alleged violations involving delinquent pension contributions. The Act clearly gives it the authority and tools to do so. The Board has utilized its subpoena power, and the courts have enforced such subpoenas, under § 11(2) of the Act, which contains an express grant of authority to courts to enforce subpoenas issued in connection "with any matter under investigation. . ." *See, e.g., Lewis v. NLRB*, 357 U.S. 10 (1958); *NLRB v. Martins Ferry Hosp. Ass'n.*, 649 F.2d 445 (6th Cir. 1981), *cert. denied*, 454 U.S. 1083 (1981); *NLRB v. Playskool, Inc.*, 431 F.2d 518 (7th Cir. 1970); *NLRB v. ITT Telecommunications*, 415 F.2d 768 (6th Cir. 1969).

If, after investigation, the NLRB determines to issue a complaint, it is clear that the NLRB has available to it injunctive authority *pending* resolution of the underlying dis-

pute pursuant to Section 10(j) of the Act. *See, e.g. Kaynard v. Palby Lingerie, Inc.*, 625 F.2d 1047, 1051, (2d Cir. 1980) (when considering a request for interim relief under § 10(j), a district court must evaluate two principal issues—whether there is reasonable cause to believe an unfair labor practice was committed and whether the requested relief is "just and proper"). This tool may be used by the NLRB to require continuation of payments to funds such as Petitioners pending the outcome of an unfair labor practice complaint proceeding.

Even if § 10(j) relief is not sought by the NLRB, the Board is a far more expeditious forum in which to resolve unfair labor practice charges than are the district courts. For example, in fiscal year 1986, 9,312 cases, or 91.7% of meritorious unfair labor practice cases, were resolved through voluntary settlement. *NLRB General Counsel's Report Summarizing Operations in Fiscal 1986*, Daily Labor Report (BNA) No. 38, at D-1 (February 27, 1987).[11] The district courts, on the other hand, are overburdened. As of June 30, 1985, 254,114 civil cases were pending in the federal district courts. The Lawyer's Almanac, 1987, at 799 (1987). On June 30, 1982, 200,885 civil cases were pending of which 13,979 were over three years old. The Lawyer's Almanac, 1984, at 645 (1984). The number of cases pending before the district courts renders them an extremely time consuming forum and less suitable for resolution of unfair labor practice disputes than is the NLRB.[12]

If the NLRB after a hearing determines that a violation has occurred, it is well equipped by statute and practice to provide a complete and adequate remedy.[13] In addition to cease and desist authority, the Board possesses broad make-whole power. Exercising that power, it has required payment,

[11] This is not to suggest that suits under ERISA are not also compromised and settled. They are. Settlements under the auspices of the NLRB occur more promptly and with less expense to the funds, however.

[12] When the length of the statutes of limitations is added to the time it may take to reach trial, the contrast between the administrative and judicial forums is even more acute.

[13] *See, e.g. NLRB v. Food Store Employees Local 347 (Heck's Inc.)*, 417 U.S. 1 (1974); *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 215 (1964).

including liquidated damages or interest, to benefit funds. *See, e.g., Mary Ann's Bakery*, 267 N.L.R.B. 992 (1983) (awarding payments plus interest); *Stone Boat Yard*, 276 N.L.R.B. No. 130 (June 14, 1985) (awarding payments and liquidated damages); *Exco Contracting Ltd.*, 261 N.L.R.B. 1120 (1982) (awarding payments and liquidated damages). It has also awarded health and medical benefits, *Knickerbocker Plastic Co.*, 104 N.L.R.B. 514 (1953), *enf'd*, 218 F.2d 917 (9th Cir. 1955), bonuses, *United Shoe Mach. Corp.*, 96 N.L.R.B. 1309 (1951), shares in profit sharing programs, *International Harvester Co.*, 169 N.L.R.B. 787 (1968), and vacation benefits, *Richard W. Kaase Co.*, 162 N.L.R.B. 1320 (1967).

In addressing unilateral changes in the terms and conditions of employment, the Board will, if a violation is found, generally order restoration of the *status quo ante* and require that employees be made whole for any benefits which have unilaterally been discontinued. *See, e.g. Atlas Tack Corp.*, 226 N.L.R.B. 222 (1976), *enf'd*, 559 F.2d 1201 (1st Cir. 1977); *American Lubricants Co.*, 136 N.L.R.B. 946 (1962). In contrast to a court in an ERISA action, the Board can remedy in a single proceeding all manifestations of an unfair labor practice, not solely the failure to make benefit fund contributions. Additionally, the Board has in certain circumstances ordered employers to reimburse the charging party and the NLRB for litigation costs. *International Union of Electrical, Radio & Machine Workers, AFL-CIO (Tiidee Products, Inc.) v. NLRB*, 426 F.2d 1243 (D.C. Cir. 1970), *reh'g denied*, 431 F.2d 1206 (1970), *cert. denied*, 400 U.S. 950 (1970), *on remand*, 194 N.L.R.B. 1234 (1972). *See also J.P. Stevens & Co.*, 244 N.L.R.B. 406 (1979), *enforced and remanded*, 668 F.2d 767 (4th Cir. 1982), *vacated and remanded*, 458 U.S. 1118 (1982) (in light of *Summit Valley Indus. v. Local 112 Carpenters*, 456 U.S. 717 (1982) (applying the "American Rule" in an action under § 303 of LMRA, but recognizing exceptions "where necessary to further the interests of justice")).[14]

[14] In *NLRB v. Food Store Employees Local 347 (Heck's Inc.)*, 417 U.S. at 8-9, this Court approved a distinction between "frivolous" and "debatable" defenses addressed by the Board in *Tiidee Products, Inc.*, 194 N.L.R.B. 1234 (1972), and *Heck's, Inc.*, 191 N.L.R.B. 886 (1971).

In sum, it is clear that the NLRB is equipped to, can, and has addressed the issues raised by Petitioners in this litigation and can provide and has provided effective remedial relief for violations such as those alleged in this case.[15]

III.

BENEFIT PLANS SHOULD BE REQUIRED TO RESORT TO THE NLRB AND GIVE BINDING EFFECT TO ITS DECISIONS.

Where the NLRB has issued a complaint and, after hearing, either dismisses the complaint, finding no violation, or finds a violation, the matter should end. Trustees and their funds should not have any fiduciary obligations *or right* to relitigate the issues in an ERISA suit. If not precluded, relitigation would risk inconsistent adjudications and drain the resources of the funds. ERISA's fiduciary obligations should not require, and conservation of judicial resources should preclude, such risks. *See e.g., United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 422 (1966); *NLRB v. Heyman*, 541 F.2d 796 (9th Cir. 1986); *International Wire v. IBEW Local 38*, 475 F.2d 1079 (6th Cir. 1973), *cert. denied*, 414 U.S. 867 (1973) (involving § 303 of Act). The risks absent application of *res judicata* or collateral estoppel or other limitation on relitigation are clearly present. *Compare United Brick & Clay Workers v. Deena Artware, Inc.*, 198 F.2d 637 (6th Cir. 1952), *cert. denied*, 344 U.S. 897 (1953) [hereinafter *Deena I*], *with United Brick & Clay Workers v. Deena Artware, Inc.*, 198 F.2d 645 (6th Cir. 1952) [hereinafter *Deena II*]. In *Deena I*, 198 F.2d at 637, the court of appeals upheld a district court judgment in a suit brought against a union under § 303 of the LMRA for secondary activity in violation of Section 8(b)(4) of

[15] NLRB's remedial authority is limited to the extent that its remedies cannot be punitive in nature. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941). Insofar as it might be argued that this limitation would preclude the NLRB from giving the same scope of relief as is available under ERISA, this Court has long held that differences in relief available are not relevant to the jurisdictional issue *vel non*. *See, Avco Corp. v. Aero Lodge 735*, 390 U.S. 557, 561 (1968); *Garner v. Teamsters*, 346 U.S. at 489-99.

the NLRA. In *Deena II*, 198 F.2d at 645, which involved the same events, the court affirmed an NLRB trial examiner's finding that the union had not engaged in secondary activity. The court stated:

> Under our existing system of courts, juries, administrative agencies and appellate review, such findings, even though inconsistent, are not invalid and one does not destroy the other. The two proceedings even though arising out of the same labor dispute were heard by separate fact finding agencies. The witnesses in the two proceedings were not the same, the cross-examinations of some witnesses who testified in both were not by the same attorney. Necessarily, the evidence produced in the different proceedings by such testimony was not identical. Each fact finding agency was entitled to make its own decision upon the evidence before it.

United Brick & Clay Workers v. Deena Artware, Inc., 198 F.2d at 642. *See also, Pantex Towing Corp. v. Glidenwell*, 763 F.2d 1241 (11th Cir. 1985); *O'Hare v. General Marine Transp. Corp.*, 740 F.2d 160 (2d Cir. 1984), *cert. denied*, 469 U.S. 1212 (1985) (addressing the separate status of trust funds from unions and finding no privity between them, thus obviating any *res judicata* effect to Board proceedings); *Quinn v. DiGiulian*, 739 F.2d 637 (D.C. Cir. 1984).[16]

While inconsistencies may be unavoidable in certain circumstances as a result of Congress' decision to confer jurisdiction on both the district courts and the NLRB in certain matters, they are not conducive to a unified and coherent national labor policy. Inconsistencies should not be allowed to multiply as a result of the unnecessary exercise of jurisdiction by the district courts over only discrete parts of core unfair labor practices. This is especially so where, as here, Congress clearly intended to confer jurisdiction in the district courts under § 502 of ERISA only where an employer's conduct violated the terms

[16] The *O'Hare* case highlights the impact and uncertainty created in the collective bargaining process by longer limitations periods under ERISA. The Court had previously held an NLRB complaint case time barred under § 10(b) of the Act and allowed suit under ERISA on the same operative facts.

of an existing collective bargaining agreement (or of a pension plan incorporated or adopted therein).

Requiring *exclusive* resort by the funds to the NLRB in cases such as this eliminates the risks of inconsistent adjudications and any problems of the applicability of *res judicata*. Giving *res judicata* effect to a final decision of the NLRB, after a full opportunity for hearing, brings the matter to an end (subject to direct appeals) without further litigation, conserving not only the assets of trust funds such as Petitioners but also conserving judicial resources.

The remaining issue is the General Counsel's almost absolute, unreviewable discretion under the Act, subject to certain possible limited exceptions, to dismiss an unfair labor practice charge after investigation. *See, NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 138-39 (1975); *Jackman v. NLRB*, 784 F.2d 759 (6th Cir. 1986); *Machinists v. Lubbers*, 681 F.2d 598 (9th Cir. 1982), *cert. denied*, 459 U.S. 1201 (1983). There appears to be no basis for the application of *res judicata* to an administrative investigation without a hearing on the merits. *See NLRB v. Denver Bldg. Trades Council*, 341 U.S. 675 (1951); *Local 290, Teamsters v. I.E. Schilling Co.*, 340 F.2d 286 (5th Cir. 1965), *cert. denied*, 382 U.S. 972 (1976).

If this Court determines to reverse the decision below and hold court jurisdiction under ERISA exists to consider and decide core unfair labor practice issues under the Act in the absence of a collective bargaining agreement, the Court should also require prior resort to the NLRB and declare that trustees may rely on an administrative determination dismissing a charge without fear that failure to file suit will constitute breach of their fiduciary duties.[17] No reason exists in law or in fact, given NLRB expertise, to argue that reliance on an administrative determination of no violation is somehow insufficient to satisfy the fiduciary obligations of trustees. The Court should also consider declaring that the principles and rationale of *Del Costello v. Teamsters*, 462 U.S. at 151, are equally applicable to cases arising under ERISA and that § 10(b) of the Act is to be applied in actions arising under § 502 of ERISA.

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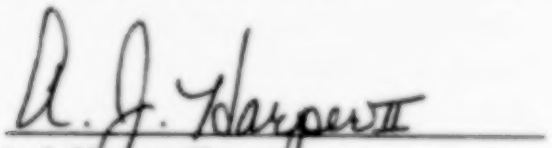
[17] ERISA requires plan fiduciaries to discharge their duties as would a prudent man acting in like capacity. § 404 of ERISA; *Palino v. Casey*, 664 F.2d 854 (1st Cir. 1981). When, as here, the obligation to contribute to benefit funds rests solely on an underlying unfair labor practice, referral of the matter to the NLRB via an unfair labor practice charge is prudent conduct because the Board is the most efficient and least expensive vehicle for the resolution of such disputes. Should the General Counsel, after investigation, dismiss the charge it would be prudent to rely on his determination. *See, Czyz v. General Pension Bd., Bethlehem Steel Corp.*, 578 F.Supp. 126 (W.D. Pa. 1983), where the court found that trustees' referral to an independent expert on issue of "good health" in order to conserve plan assets was a sound basis for fiduciary action.

For this Court to declare that a decision by the trustees to rely on a decision of the General Counsel dismissing the unfair labor practices charge upon which the alleged duty to contribute rests would preserve the judgment of the trustees, eliminate a risk of challenge to their judgment, and enhance the probability that fund assets will be conserved.

CONCLUSION

In sum, AGC submits the decision below is correct and should be affirmed. If the Court disagrees and reverses, it should require benefit funds to first resort to the NLRB when unfair labor practice issues are involved in collection actions, and to abide by its decision or administrative dismissal.

Respectfully submitted,



A. J. Harper II
Counsel of Record

T. J. Wray
David M. Thomas

Counsel for the Associated
General Contractors of
America, Inc.

Dated: July 10, 1987

CERTIFICATE OF SERVICE

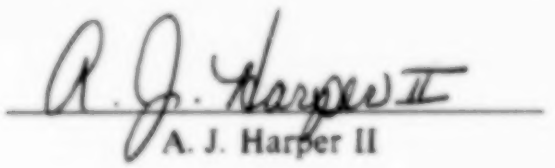
I, A. J. Harper II, Counsel of Record for Associated General Contractors of America, Inc., do hereby certify that pursuant to Rules 28.3 and 28.5(b) of the Rules of the Supreme Court of the United States, true and correct copies of the foregoing Motion for Leave to File a Brief *Amicus Curiae* in Support of the Respondent and Brief of the Associated General Contractors of America, Inc., as *Amicus Curiae* were served upon the following individuals on this the 10th day of July, 1987, by placing same in the United States mail, certified, return receipt requested, postage prepaid:

Blythe Mickelson, Esq.
Van Bourg, Weinberg, Roger & Rosenfeld
875 Battery Street
San Francisco, California 94111

COUNSEL OF RECORD FOR PETITIONERS
LABORERS HEALTH AND WELFARE TRUST
FUND FOR NORTHERN CALIFORNIA, *ET AL.*

Mark S. Ross, Esq.
Schachter, Kristoff, Ross, Sprague & Curiale
101 California Street, Suite 2900
San Francisco, California 94111

COUNSEL OF RECORD FOR RESPONDENT
ADVANCED LIGHTWEIGHT CONCRETE CO.,
INC.



A. J. Harper II